

file

BEFORE THE  
STATE OF WISCONSIN

DIVISION OF HEARINGS AND APPEALS

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Application of Dennis and Lee Schwab     )  
for an "After-the-Fact" Permit to         )  
Grade Adjacent to Round Lake, Town of     )     Case No. 3-LM-94-482  
Farmington, Waupaca County, Wisconsin    )

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FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND AFTER-THE-FACT PERMIT

Dennis and Lee Schwab applied to the Department of Natural Resources for an after-the-fact permit pursuant to § 30.19, Stats., to grade an area in excess of 10,000 square feet in size adjacent to Round Lake in the Town of Farmington, Waupaca County, Wisconsin. The Department of Natural Resources issued a Notice of Proposed DNR Permit which stated that unless written objection was made within 30 days of publication of the Notice, the Department might issue a decision on the permit without a hearing. Several timely objections were received by the Department.

On April 3, 1995, the Department forwarded the file to the Division of Hearings and Appeals for hearing. Pursuant to due notice a hearing was held on June 22, 1995, in Waupaca, Wisconsin, before Mark J. Kaiser, Administrative Law Judge.

In accordance with §§ 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Dennis and Lee Schwab, Applicants  
N2644 Pleasant Park Lane  
Waupaca, Wisconsin 54981

Wisconsin Department of Natural Resources, by

Michael Scott, Attorney  
P. O. Box 7921  
Madison, Wisconsin 53707-7921

Peter S. Nelson  
W2703 Browne Lane  
Waupaca, Wisconsin 54981

### FINDINGS OF FACT

1. Dennis and Lee Schwab (Schwabs) own property adjacent to Round Lake. Round Lake is a navigable waterway within the State of Wisconsin. The legal description of the property is the NW 1/4, SE 1/4 of Section 33, Township 22 North, Range 11 East, Town of Farmington, Waupaca County. When the Schwabs purchased the property a small cottage existed on the site. Commencing around July of 1993, the Schwabs began making plans to remove the existing cottage and build a new home on the property.

2. In December, 1993, the existing cottage and a large number of trees were removed from the property. Nearly all the trees between the site of the proposed new home and the shoreline were removed. Subsequently the shoreline was graded and a small wetland area along the south side of the property was filled.

3. The area of shoreline which was graded is an area 150 feet by 80 feet, a total of 12,000 square feet. The grading and filling of the wetland was done without permit from the Department.

4. After contact from staff of the Department, the Schwabs restored the wetland according to Department requirements and applied for an after-the-fact permit for the grading along the shoreline. The applicants and the Department of Natural Resources (Department) have fulfilled the procedural requirements of §§ 30.19 and 30.02, Stats.

5. The grading performed on the shoreline of the Schwab's property will not adversely impact any fish or game habitat. The grading will not cause any environmental pollution as the phrase "environmental pollution" is defined in § 144.01(3), Stats.

6. The public interest allegedly affected by the grading is the enjoyment of the aesthetics of the natural shoreline viewed from the water. The cutting of large trees on the Schwab property and replacing a small cottage with a much larger house impacts on the natural aesthetics of the shoreline. Prior to the construction of the Schwab's house, the stretch of shoreline surrounding the Schwab property was a relatively unbroken span of green vegetation.

The only non-natural objects visible were piers and boat stations and minimal glimpses of buildings showing between trees. The Schwab house is a substantial break in the expanse of green vegetation. The house is clearly visible from across Round lake. However, with the conditions set forth below the grading will not injure the public interest in the aesthetics of the natural shoreline.

## DISCUSSION

The persons opposing the after-the-fact permit essentially had two objections. The first objection was that the Schwabs had completed the grading (and other work not within the scope of this hearing) without a permit. Witnesses provided anecdotal evidence of other persons who proceeded with similar projects also without permits. The witnesses felt that an example should be made of the Schwabs to discourage other people from ignoring state statutes, Department of Natural Resources' administrative rules and Waupaca County shoreline zoning ordinances. While one can empathize with the frustration these witnesses are experiencing when they see statutes and rules intended to protect the environment ignored, *this proceeding is not the forum to address this problem.*

A separate enforcement action was commenced against the Schwabs for their violation of § 30.19, Stats. Whether the fine assessed as a result of that enforcement action is adequate to discourage other property owners from commencing similar projects without permits is not within the scope of this hearing. Additionally, denying the application for an after-the-fact permit because of the violation or imposing punitive conditions on the permit is not appropriate.

The second objection raised by witnesses at the hearing was that the Schwabs had cut down an excessive number of mature trees to build their house and grade the shoreline. Pursuant to Chapter NR 115, Wis. Adm. Code, the Department requires counties to enact shoreline zoning. Section NR 115.05(3)(c), Wis. Adm. Code, requires that the shoreline zoning regulate the cutting of trees and shrubbery. This section provides that the county shoreline zoning ordinance include the following:

**(c) Trees and shrubbery.** The cutting of trees and shrubbery shall be regulated to protect natural beauty, control erosion and reduce the loss of effluents, sediments and nutrients from the shoreland area.

1. In the strip of land 35 feet wide inland from the ordinary high-water mark, no more than 30 feet in any 100 feet shall be clear-cut.

2. In shoreland areas more than 35 feet inland, trees and shrub cutting shall be governed by consideration of the effect on water quality and consideration of sound forestry practices and soil conservation practices.

3. The tree and shrubbery cutting regulations required by this paragraph shall not apply to the removal of dead, diseased or dying trees or shrubbery.

The Waupaca County shoreline zoning ordinance is not included in the record for the hearing; however, presumably it complies with requirements of Chapter NR 115, Wis. Adm. Code. It is not clear from the testimony at the hearing whether the zoning ordinance was violated. Approximately thirty-five trees were removed from the Schwab property. However, only seven trees were removed from the strip of land thirty-five feet inland from the ordinary high watermark. These trees were removed to provide a sight corridor from the house to the lake. Whether an area wider than thirty feet within the strip was clear-cut can not be determined from the evidence in the record.

Additionally, Paul Roloff, the person who removed the trees, testified that at least one tree was diseased (oak wilt) and others were damaged by pileated woodpeckers. Some trees had to be removed to accommodate construction of the house. The majority of trees removed were between the existing house and the road. It is not clear why these trees were removed or whether their removal violated the county shoreline zoning ordinance.

The Schwab property after construction of the new house and the grading is clearly more visually intrusive than the property as it previously existed. The Schwabs do have a right to build a house on their property, the fact that it is clearly visible from across the lake is unfortunate. The Department required the Schwabs to plant new trees to screen the house from the lake. The trees have been planted; however, it will take time for them to grow to a size which will provide any screening. With the condition that these trees be planted and replaced, if necessary, granting the after-the-fact permit for the grading done by the Schwabs will not injure the public interests in the aesthetics of the shoreline of Round Lake.

#### CONCLUSIONS OF LAW

1. The grading performed by Dennis and Lee Schwab is in excess of 10,000 square feet on the shore of a navigable lake. Accordingly, a permit pursuant to § 30.19(2), Stats., is required.

2. The Division of Hearings and Appeals has authority under §§ 30.19 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue the following Permit subject to the conditions specified below.

3. The grading performed by the applicants is a type IV action pursuant to § NR 150.03(8)(f)2, Wis. Adm. Code. Type IV actions do not require the preparation of an environmental impact statement or assessment.

#### AFTER-THE-FACT PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicants a permit under § 30.19, Stats., for the grading along the shoreline of Round Lake previously

completed subject, however, to the conditions that:

1. The permittees shall waive any objection to the free and unlimited inspection of the site at any time by any employee of the Department of Natural Resources for the purpose of investigating the construction and maintenance of the project.
2. The permittees shall obtain any necessary authority needed under local zoning ordinances and from the U S. Army Corps of Engineers.
3. The permit does not authorize any work other than what is specifically described in the application dated July 27, 1992 or the restoration plan dated September 3, 1994 (exhibit 2 at the hearing) along with the changes detailed by the Department in its letter dated September 21, 1994 (exhibit 15 at the hearing).
4. Any trees shown in the September 3, 1994, plan or listed in the September 21, 1994, letter located within the 35 foot wide strip from the shoreline of Round Lake inland shall not be removed unless they are dead, diseased or dying and, if removed, shall be replaced with a tree of the same type and at least as large as shown in the plan or described in the letter.

Acceptance of this permit shall be deemed acceptance of the conditions specified.

Dated at Madison, Wisconsin on August 1, 1995.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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By Mark J. Kaiser  
MARK J. KAISER  
ADMINISTRATIVE LAW JUDGE

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.